MOTION FILED

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No. 00-433

In The

# Supreme Court of the United States

WESTSIDE QUIK SHOP, INC., et al.,

*Petitioners,*

v.

ROBERT M. STEWART, et al.,

*Respondents.*

On Petition For Writ Of Certiorari
To The South Carolina Supreme Court

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF R.L. JORDAN OIL COMPANY OF NORTH CAROLINA, INC. IN SUPPORT OF PETITIONERS

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of this Court, *amicus curiae* R.L. Jordan Oil Company of North Carolina, Inc. moves for leave to file the accompanying brief *amicus curiae*.

The petitioners in this matter have consented to the filing of this brief *amicus curiae*. The petitioners' consent letter has been filed with the Clerk of this Court. *Amicus curiae* has sought the consent of the respondents, through their counsel, the South Carolina Attorney General. However, the Office of the Attorney General has informed *amicus curiae* that its position is neither to consent to nor to oppose the filing of this brief *amicus curiae*. Therefore, it appears necessary to file this Motion for Leave to File Brief *Amicus Curiae*.

*Amicus curiae* is a South Carolina corporation that, in conjunction with its affiliated companies, owns and operates sixty-one (61) convenience stores in the States of South Carolina, North Carolina and Georgia. *Amicus curiae* owned, prior to the effective date of Act 125, approximately five hundred seventeen (517) video gaming machines similar to those owned by the petitioners. Because Act 125 declared such video gaming machines to be illegal contraband, effective as of July 1, 2000, *amicus curiae* has lost substantial amounts due to the loss in value of these machines and the loss in value of buildings that were constructed to serve as casinos for these machines. *Amicus curiae* initiated an action, similar to the petitioners', against the State of South Carolina on September 17, 1999, which alleges, among other things, that

the promulgation of Act 125 resulted in an unconstitutional taking of its property without just compensation in violation of the Fifth Amendment to the United States Constitution. This action has yet to reach trial in the State circuit court.

*Amicus curiae* is informed and believes that, while it is similarly situated to the petitioners, it is substantially larger than either of the petitioner corporations, insofar as *amicus curiae* currently owns or previously owned sixty-one (61) convenience stores, thirteen (13) casinos and five hundred seventeen (517) video gaming machines. Consequently, it believes that it will be able to provide a unique perspective to the Court regarding the impact of Act 125 on *amicus curiae*, its employees and the consumers of the State of South Carolina. *Amicus curiae* respectfully requests that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

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## INTEREST OF *AMICUS CURIAE*[1]

As indicated in its Motion for Leave to File Brief *Amicus Curiae, amicus curiae* R.L. Jordan Oil Company of North Carolina, Inc. ("Jordan Oil") is a South Carolina corporation that, along with its affiliated companies, owns and operates sixty-one (61) convenience stores in the States of South Carolina, North Carolina and Georgia. Prior to the July 1, 2000 effective date of Act 125, Jordan Oil owned five hundred seventeen (517) video gaming machines and thirteen (13) casinos that were operated in South Carolina in compliance with prior statutory law and applicable Department of Revenue regulations. By virtue of the promulgation of Act 125, all of Jordan Oil's video gaming machines were declared to be illegal contraband and all of its casinos were forced to close (including five (5) casinos that were never allowed to open due to the retroactive application of certain provisions of Act 125). Consequently, Jordan Oil has suffered substantial losses totaling approximately $4,597,800 in diminution in the value of its real and personal property, and other losses as well. Jordan Oil has initiated an action against the State of South Carolina that is similar in substance to the petitioners' action below, and which alleges that the promulgation of Act 125 has resulted in an unconstitutional taking of Jordan Oil's property without just

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[1] No counsel for any party authored this brief *amicus curiae*, either in whole or in part, and no persons other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

compensation as prohibited by the Fifth Amendment to the United States Constitution.

## SUMMARY OF ARGUMENT

Act 125 was signed into law by the Governor of the State of South Carolina on July 2, 1999. By virtue of the South Carolina Supreme Court's decision in *Joytime Distributors & Amusement Co. v. State of South Carolina*, No. 25007, 1999 WL 969280 (S.C. Oct. 14, 1999), *cert. denied*, 120 S.Ct. 1719 (2000), Act 125 outlawed video gaming in South Carolina, effective July 1, 2000. Act 125 also retroactively outlawed video gaming casinos that were not fully licensed and operational by May 31, 1999.

For approximately twenty-four (24) years prior to the promulgation of Act 125, South Carolina statutory law and Department of Revenue regulations had authorized the operation of video gaming machines within the State of South Carolina. These laws, regulations and other actions of State officials encouraged the investment by Jordan Oil and other businesses of substantial sums of money on appropriate types of video gaming machines and other equipment, and on the construction of video gaming casinos that complied with applicable regulations. By virtue of the promulgation of Act 125, the State of South Carolina has rendered such investments virtually worthless and has denied Jordan Oil and others their private property rights without just compensation as prohibited by the Fifth Amendment to the United States Constitution.

## ARGUMENT

*Amicus curiae* R.L. Jordan Oil Company of North Carolina, Inc., like the petitioners in this matter and numerous other businesses in South Carolina, has been dramatically impacted by the promulgation of Act 125, which, effective July 1, 2000, banned the operation or possession of video gaming machines in South Carolina. As a convenience store owner and operator, Jordan Oil, like the petitioners, lawfully operated video gaming machines for many years and made substantial investments in this part of its business. These video games allowed many convenience stores, including some of Jordon Oil's stores, simply to stay in business. As a result of Act 125's ban on video gaming machines, Jordon Oil and others have suffered severe losses in the value of both their real and personal property.

Jordan Oil and its predecessor entities were founded by Mr. Robert L. Jordan and date back to the 1950s. Mr. Jordan served in the Army during the Korean War and was stationed in Japan. He sent one-half of his pay back to his parents in the United States to help support them. Upon his return from service, Mr. Jordan discovered that his parents had saved the money that he had sent home and wanted him to have it. Mr. Jordan used this money to purchase a convenience store in Franklin, North Carolina in the 1950s. Affidavit of Wilton Jordan at ¶ 2 (App. at 7A).

Shortly after opening the Franklin store, Mr. Jordan determined that he could transport gasoline to his station himself, instead of paying someone else approximately

$0.05 per gallon to do it. He ended up transporting gasoline to a number of other stations, in addition to his own. *Id.* at ¶ 3 (App. at 7A). He eventually earned enough money to buy a second convenience store, and then additional stores. *Id.* at ¶ 4 (App. at 7A). In the 1960s, Mr. Jordan introduced self-service gasoline to South Carolina. *Id.* at ¶ 5 (App. at 7A).

During the oil crisis of the early 1970s, Mr. Jordan's business nearly lost everything. The majority of the gas stations he supplied went out of business. He was also forced to close many of his own stores. *Id.* at ¶ 6 (App. at 8A). The company survived, however, and today owns and operates sixty-one (61) convenience stores in South Carolina, North Carolina and Georgia. *Id.* at ¶ 7 (App. at 8A).

Mr. Dan B. Durbin is the president of the company and has been with Jordan Oil since 1981. Affidavit of Dan B. Durbin at ¶ 1 (App. at 1A). Four of Mr. Jordan's five children are also employed full-time by the company and hold various management positions within the company. Affidavit of Wilton Jordan at ¶ 8 (App. at 8A).

Jordan Oil first operated video gaming machines in its South Carolina stores in 1983. At that time, Jordan Oil operated video games that were owned by third parties and would share the profits from the games with the owners, usually on a 50%-50% basis. Before Jordan Oil added video games to its stores, it had basically been a "break even" company, which made enough money to stay in business. The video games allowed Jordan Oil to become profitable on a more consistent basis. Affidavit of Dan B. Durbin at ¶¶ 2, 3 (App. at 1A).

In about 1994, Jordan Oil began purchasing some of its own video gaming machines, at a cost of about $3,500 per game. Jordan Oil's management decided to increase its investment in video games, in part, because many of its competitors had been operating video games in their stores and had put Jordan Oil at a competitive disadvantage. These competitors were able to draw customers away from Jordan Oil not only by offering video games, but also by charging lower prices on other products such as milk and gasoline and offsetting their lower margins with video game profits. *Id.* at ¶ 4 (App. at 1A-2A).

In the mid-1990s, the South Carolina Department of Revenue ("DOR") began planning a system to monitor all video gaming machines throughout the State, by requiring that they all be linked into a central monitoring system which was intended to allow the State to monitor revenues and payouts from video gaming machines. In order to comply with the State's regulations, video game operators were going to be required to purchase a certain type of video gaming machine that had the capacity to link into this system, as well as controllers (modems) that would actually link the games to the system. *Id.* at ¶¶ 5, 6 (App. at 2A).

The video games that Jordan Oil had purchased prior to the development of this DOR monitoring system did not have the required features to allow them to link into the system. Because Jordan Oil understood that its games would no longer be allowed under the new monitoring regulations, it began to sell its existing games (for which it had paid about $3,500 each) for about $1,500 to $2,000 per game. In all, Jordan Oil sold about one hundred (100) of these games. *Id.* at ¶ 7 (App. at 2A-3A).

Jordan Oil began purchasing video games that would comply with the new monitoring regulations. These games cost substantially more than the original games, approximately $7,500 each. The more expensive games were *not* any more profitable than the original games, and the only reason Jordan Oil invested the money in these games was because it believed that these games would be required under the new DOR regulations. Jordan Oil ultimately purchased approximately 517 of these more expensive games. Jordan Oil also purchased some of the controllers that were required to link the games into the State system, at a cost of about $17,000. *Id.* at ¶¶ 8, 9 (App. at 3A).

Ultimately, the State never fully implemented the monitoring system before declaring video gaming illegal under Act 125. Consequently, all of the controllers that Jordan Oil had purchased were rendered absolutely worthless, and the additional money Jordan Oil had invested in the more expensive games was wasted. The market value of these games has been reduced by approximately $5,400 per game by virtue of the impact of Act 125, because none of the prospective purchasers for these games has a need for the monitoring capacity that these games have. Consequently, Jordan Oil has lost approximately $2,791,800 ($5,400 x 517) on the fair market value of its video games which it has been forced to relocate or sell since the effective date of Act 125. *Id.* at ¶ 10 (App. at 3A-4A).

Jordan Oil also constructed 13 video gaming casinos during the late 1990s. The DOR issued regulations describing the specifications that were required for casinos. For example, every separate game room had to

be fully enclosed and had to have an electrical meter hooked up to it. Each room could hold up to 5 games. Under the DOR regulations, therefore, casinos were required to be constructed with a number of small, separate rooms, which made the buildings unsuitable for anything other than the operation of casinos. After each casino was constructed, the DOR would send an inspector to the site to confirm that the building complied with the DOR regulations. *Id.* at ¶¶ 11, 12 (App. at 4A).

Because of the ban on video gaming in Act 125 and the unsuitability of the casino structures for other uses, the fair market value of Jordan Oil's casino real estate has been reduced by approximately $1,789,000. Jordan Oil has made efforts to sell or lease these buildings, but has had no success, with the exception of one building that it has leased for less than fair market value. *Id.* at ¶ 11 (App. at 4A).

Five of Jordan Oil's 13 casinos were never allowed to fully open by virtue of Act 125. At these 5 locations, Jordan Oil had completed construction of the casinos, including the parking lots and signage, and had obtained all necessary permits except for the establishment licenses which had to be issued by the DOR. Jordan Oil applied for these establishment licenses prior to May 31, 1999 but was not issued the licenses until after May 31, 1999. Act 125, which was signed into law by the Governor on July 2, 1999, made all casinos illegal unless they had been fully licensed and operational prior to May 31, 1999. Because of the *retroactive* application of this law, Jordan Oil was never allowed to open these 5 casinos for which it had already invested the construction and other start up costs. Jordan Oil lost approximately $1,191,672 in

profits from July 1, 1999 to June 30, 2000 by not being allowed to open these casinos prior to the ban going into effect on July 1, 2000. *Id.* at ¶ 13 (App. at 4A-5A).

During the mid and late 1990s, Jordan Oil was able to expand its operations by virtue of the revenue generated by its video games. Jordan Oil opened new convenience stores, and opened restaurants (such as Subway sandwich shops) in 26 of its stores. These restaurants were generally not profitable on their own, and would not have been opened without the revenue available from Jordan Oil's video games. By virtue of its expansion, Jordan Oil was able to employ approximately 1200 employees during the late 1990s. *Id.* at ¶ 14 (App. at 5A).

Due to the additional revenue generated by its video gaming machines, Jordan Oil was also able to charge less for its other convenience store products, such as gasoline and milk. For example, Jordan Oil's profit margin on gasoline during the mid and late 1990s was generally only about 50% of its historical profit margin on gasoline. *Id.* at ¶ 15 (App. at 5A-6A).

Since Act 125 went into effect on July 1, 2000, Jordan Oil has been forced to close all of its casinos and 13 of its 26 restaurants. Jordan Oil has also been forced to lay off employees. Presently, Jordan Oil employs about 800 employees, compared to 1200 approximately two years ago. As a result of Act 125's ban on video gaming, a number of Jordan Oil's stores are presently losing money and probably will continue to lose money for the foreseeable future. Jordan Oil has 4 stores now which are losing so much money that they will have to be either closed

down or sold within a short period of time. *Id.* at ¶¶ 16, 17 (App. at 6A).

Since 1983, Jordan Oil made all of its investments in video games, related equipment and video game casinos in good faith reliance on existing and proposed laws and regulations of the State of South Carolina. Jordan Oil operated its video games in full compliance with such laws and regulations. *Id.* at ¶ 2 (App. at 1A). By declaring such games to be illegal contraband, the State of South Carolina has taken property of Jordan Oil and many other convenience store owners without just compensation as prohibited by the Fifth Amendment to the United States Constitution.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 20, 2000

STATE OF SOUTH CAROLINA ) AFFIDAVIT OF
)
COUNTY OF SPARTANBURG ) DAN B. DURBIN

I, Dan B. Durbin, being duly sworn, depose and state as follows:

1. I am the President of R.L. Jordan Oil Company of North Carolina, Inc ("Jordan Oil"), which, along with its affiliated companies, owns and operates 61 convenience stores in South Carolina, Georgia and North Carolina. I have worked for Jordan Oil since 1981.

2. In about 1983, Jordan Oil first installed video poker games in several of its convenience stores. These games were owned by third parties, and Jordan Oil would share the profits from the games with the game owners, usually on a 50%-50% basis. From 1983 until July 1, 2000, Jordan Oil operated its games in compliance with applicable State laws and regulations.

3. Before Jordan Oil added these video games to its stores, the company had generally been a "break even" company, which basically made enough money to keep it in business. With the additional revenue generated by the video poker games from 1983 on, Jordan Oil was able to become profitable on a more consistent basis.

4. In about 1994, Jordan Oil began purchasing some of its own video poker games, at a cost of about $3,500 per game. Jordan Oil's management decided to increase its investment in video games, in part, because

many of its competitors had been operating video games in their stores and had put Jordan Oil at a competitive disadvantage by drawing away customers. On information and belief, these competitors were able to draw customers not only by offering video games, but also by charging lower prices on other products and offsetting their lower margins with video game profits.

5. In the mid-1990s, the South Carolina Department of Revenue ("DOR") began planning a system to monitor all video poker games throughout the State, by requiring that they all be linked into a central monitoring system. On information and belief, this system was intended to allow the state to monitor revenues and payouts from video poker games.

6. In order to comply with the regulations that the State was developing for its monitoring system, video game operators were going to be required to purchase a certain type of video game that had the capacity to link into this system, as well as controllers (modems) that would actually link the games to the system.

7. The video games that Jordan Oil had purchased prior to the development of this DOR monitoring system did not have the required features to allow them to link into the system. Because Jordan Oil understood that its games would no longer be allowed under the new monitoring regulations, it began to sell its existing games (for which it had paid about $3,500 each) for about

$1,500 to $2,000 per game. In all, Jordan Oil sold about 100 of these games.

8. Jordan Oil began purchasing video games that would comply with the new monitoring regulations. These games cost substantially more than the original games, approximately $7,500 each. The more expensive games were not any more profitable than the original games, and the only reason Jordan Oil invested the money in these games was because it believed that these games would be required under the new DOR regulations. Jordan Oil ultimately purchased approximately 517 of these more expensive games.

9. Jordan Oil also purchased some of the controllers that were required to link the games into the State system, at a cost of about $17,000.

10. Ultimately, the State never fully implemented the monitoring system before declaring video poker illegal under Act 125. Consequently, all of Jordan Oil's expenditures on controllers and the more expensive video games were rendered absolutely worthless. Based on my efforts to sell these games, I estimate that the market value of the more expensive games has been reduced by approximately $5,400 per game by virtue of Act 125, because no one else who would purchase these games has a need for the monitoring capacity that these games have. Consequently, Jordan Oil has lost approximately $2,791,800 ($5,400 x 517) in the fair market value of its video

games which it has been forced to relocate or sell.

11. Jordan Oil also constructed 13 video game casinos during the late 1990s. The DOR issued regulations describing the specifications that were required for casinos. For example, every separate game room had to be fully enclosed and had to have an electrical meter hooked up to it. Each room could hold up to 5 games. Under the DOR regulations, therefore, casinos were required to be constructed with a number of small, separate rooms, which made the building unsuitable for anything other than the operation of a casino. By virtue of the ban on video poker in Act 125, I estimate that the fair market value of Jordan Oil's casino real estate has been reduced by approximately $1,789,000. Jordan Oil has made efforts to sell or lease these buildings without success, with the exception of one building that it has leased for less than fair market value.

12. After each casino was constructed, the DOR would send an inspector to the site to confirm that the building complied with the DOR regulations.

13. Five of Jordan Oil's 13 casinos were never allowed to fully open by virtue of Act 125. At these 5 locations, Jordan Oil had completed construction of the casinos, including the parking lots and signage, and had obtained all necessary permits except for an establishment license which had to be issued by the DOR. Jordan Oil applied for these establishment licenses prior to May

31, 1999 but was not issued the licenses until after May 31, 1999. Act 125, which was signed into law by the Governor on July 2, 1999, made all casinos illegal unless they had been fully licensed and operational prior to May 31, 1999. Because of the retroactive application of this law, Jordan Oil was never allowed to open these 5 casinos for which it had already invested the construction and other start up costs. Furthermore, based on the revenues that were generated by Jordan Oil's other casinos during this time, I estimate that Jordan Oil lost approximately $1,191,672 in profits from July 1, 1999 to June 30, 2000 by not being allowed to open these casinos prior to the ban going into effect on July 1, 2000.

14. During the mid and late 1990s, Jordan Oil was able to expand its operations by virtue of the revenue generated by its video games. Jordan Oil opened new convenience stores, and opened restaurants (such as Subways) in 26 of its stores. These restaurants were generally not profitable on their own, and would not have been opened without the revenue available from Jordan Oil's video games. By virtue of its expansion, Jordan Oil was able to employ approximately 1200 employees during the late 1990s.

15. Due to the additional revenue generated by its video poker games, Jordan Oil was also able to charge less for its other convenience store products, such as gasoline and milk. For example, Jordan Oil's profit margin on

gasoline during the mid and late 1990s was generally only about 50% of its historical profit margin on gasoline.

16. Since Act 125 went into effect on July 1, 2000, Jordan Oil has been forced to close all of its casinos and 13 of its 26 restaurants. Jordan Oil has also been forced to lay off employees. Presently, Jordan Oil employs about 800 employees, compared to 1200 approximately two years ago.

17. As a result of Act 125, a number of Jordan Oil's stores are presently losing money, and I anticipate they will continue to lose money for the foreseeable future. Jordan Oil has 4 stores now which are losing so much money that they will have to be either closed down or sold within a short period of time.

Further affiant sayeth not.

_____

Dan B. Durbin

Sworn to and subscribed before me
This 18th day of October, 2000

_____

Notary Public for South Carolina
My Commission Expires:_____

STATE OF SOUTH CAROLINA ) AFFIDAVIT OF
)
COUNTY OF SPARTANBURG ) WILTON JORDAN

I, Wilton Jordan, being duly sworn, depose and state as follows:

1. My father, Robert L. Jordan, founded R.L. Jordan Oil Company of North Carolina, Inc. ("Jordan Oil"). I am employed by Jordan Oil as its Director of Construction and Engineering.

2. My father served in the Army and was stationed in Japan during the Korean War. While he was in the Army, he sent one-half of his pay home to his parents to help support them. When he returned home from service, he learned that his parents had saved all of the money he had sent home, and they gave it to him. In the 1950s, he used this money to purchase a convenience store in Franklin, North Carolina.

3. After operating his convenience store for some period of time, my father realized that he was paying about 5 cents per gallon for someone else to bring gasoline to his store. He decided that he could transport gasoline to his own store, and to other gas stations as well.

4. My father eventually made enough money to buy another gas station, and later built some of his own stores.

5. In the 1960s, my father introduced self-service gasoline in South Carolina.

6. During the gasoline crisis of the early 1970s, most of the gas stations that my father delivered gasoline to were forced to close down. My father was also forced to close many of his gasoline stations.

7. Today, Jordan Oil and its affiliates own and operate 61 convenience stores in South Carolina, Georgia and North Carolina.

8. Four of my father's 5 children, including myself, now work for Jordan Oil in management positions.

Further affiant sayeth not.

_____

Wilton Jordan

Sworn to and subscribed before me
This 18th day of October, 2000

_____

Notary Public for South Carolina
My Commission Expires:_____